CAPITAL CASE

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington, Plaintiff, vs. Joseph T. McEnroe and Michele K. Anderson, Defendants.	No. 07-1-08716-4 SEA ☒ No. 07-1-08717-2 SEA ☐ **Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States**

Defendant McEnroe has filed a motion requesting that this Court "Preclude the Possibility of a Death Sentence Based upon Alleyne v. United States", ___ U.S. __, 131 S. Ct. 2151 (2013). Defendant Anderson has joined in that motion. McEnroe contends that pursuant to the analysis in Alleyne, "absence of sufficient mitigating circumstances to warrant leniency" under RCW 10.95 is an element and must be pled in the charging document. McEnroe contends that since this element is not pled in the Information, the death penalty must be "precluded."

ORIGINAL

Alleyne v. United States was decided by the United States Supreme Court in June 2013. In Alleyne, the Court extended the Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), line of cases, and overruled its earlier decision in Harris v. United States, 536 U.S. 584 (2002).

I. Alleyne v. United States, ___ U.S. ___, 131 S.Ct. 2151 (2013)

Allen Alleyne was convicted by a jury of the federal offense of "using or carrying a firearm in relation to a crime of violence." This was the core crime for which the statute prescribed a penalty range with a mandatory minimum of five years. Under the statutory scheme at issue there, an additional finding of brandishing the firearm triggered an increase to the mandatory minimum, raising the "penalty floor" to seven years rather than five. The sentencing judge found that Alleyne had brandished the firearm. The Court then sentenced Alleyne to the mandatory minimum of seven years consistent with the additional finding. Alleyne at 2155.

In reversing Alleyne's sentence, the United States Supreme Court embraced and expanded its holding in Apprendi. In Apprendi, a New Jersey hate crimes statute had authorized an increase in the "penalty ceiling" if the sentencing judge found that the defendant had a biased purpose for committing the core crime. Apprendi at 468. Writing for the majority in Alleyne, Justice Thomas observed that the Apprendi Court had "concluded that any 'facts that increase the prescribed range of penalties to which a defendant is exposed' are elements of the crime." Alleyne at 2160 (quoting Apprendi at 490).

Extending Apprendi's analysis to include a finding that raises the prescribed penalty floor, the majority in Alleyne held that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyne at 2161. As the Court observed, "[b]ut for a finding of brandishing," Alleyne's penalty could be as few as five years. With the finding of brandishing, however, his penalty could be no fewer than seven years. Alleyne at 2160.

Because the fact of brandishing a firearm increased the mandatory minimum sentence from five to seven years, the Court held that the fact necessarily constituted an element of a separate, aggravated offense, and must be found by a jury rather than by a judge at sentencing. Alleyne at 2162.

II. State v. McEnroe

Application of the analytical framework set forth in Alleyne to the case at bar is remarkably straight-forward. As to each defendant found guilty of the core crime of aggravated murder in the first degree, the mandatory penalty authorized by statute is life in prison without the possibility of parole. A sentence of death can only be imposed if a unanimous jury finds beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4). *But for a finding of insufficient mitigation*, a defendant's sentence upon conviction of the statutory offense is life without parole. With that finding, however, the mandatory sentence is death. It is the finding of insufficient mitigation that increases the prescribed, *mandatory* penalty for the statutory offense from life without parole to death. The significance of this finding is

starkly illustrated by the fact that both potential sentences stand in isolation with no range within which a court may exercise discretion.

Accordingly, relying solely on the rationale expressed in Alleyne, this court would be compelled to hold that the jury's finding pursuant to RCW 10.95.060(4) is an essential element of the crime for which the mandatory punishment is death.

The State, however, maintains that Alleyne is inapplicable. First, they argue that the death penalty is different because it is the only sentencing scenario in Washington in which the jury makes the sentencing decision. They maintain, therefore, that the required finding pursuant to RCW 10.95.060(4) is not an element, but rather a part of the sentencing function that the jury must fulfill by statutory mandate.

While it is true that the determination is required by statute as part of the special sentencing proceeding, the mere fact that the required finding is located in the sentencing provisions of a statute does not mean that it is not an element. Apprendi at 495. Furthermore, as Justice Thomas wrote in Alleyne as well as in his concurrence in Apprendi, "establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Alleyne at 2163. The jury's finding under RCW 10.95.060(4) is the essential prerequisite to the imposition of a death sentence in the State of Washington and, therefore, it is essential to establishing what punishment is available or required.

The State next argues that the finding made by the jury pursuant to RCW 10.95.060(4) is not a traditional "finding of fact," thus rendering the analysis in Alleyne and its predecessors inapplicable. The State is correct that the jury's role in the penalty phase of a death penalty proceeding is unlike any other under Washington law.

However, the jury is still being called upon to make a "finding" in regard to a specific statutory directive. The mere uniqueness of the jury's charge in the penalty phase of a death penalty proceeding does not render it less of a finding.

Moreover, our Supreme Court has characterized the jury's finding under RCW 10.95.060(4) as a factual determination. State v. Yates, 161 Wn.2d 714, 756 (2007). Accordingly, this court is not persuaded that the jury's determination under RCW 10.95.060(4) is immune from the application of Alleyne on the ground that it is not a finding of fact.

The State also contends that Alleyne is inapplicable because the case did not involve the adequacy of the charging document but simply involved the defendant's right to have a jury decide whether he had brandished the weapon. Again, the State is correct that the adequacy of the charging document was not at issue in Alleyne, but that does not denigrate that Court's analysis regarding what constitutes an element of a crime. Likewise, the fact that a jury will ultimately determine the sufficiency of mitigation under RCW 10.95.060(4) does not render Alleyne moot.

The issue before this Court is not whether the finding of a particular fact must be made by a jury. Rather, the "essential inquiry" is whether that fact is itself an element of the crime. Alleyne at 2162. The Alleyne Court's inquiry had its context only after the finding of brandishing was first determined to be an element for purposes of constitutional protections. The Court's element analysis was preliminary to its decision to extend the Sixth Amendment protection.

The Apprendi Court also emphasized that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment

than that authorized by the jury's guilty verdict." Apprendi at 494. It is irrefutable that the finding under RCW 10.95.60(4) exposes defendants charged with the statutory offense of aggravated murder in the first degree to a greater punishment than is otherwise authorized by statute upon the jury's verdict of guilty.

III. State v. Yates, State v. Recuenco, State v. Powell, State v. Siers

Based upon the recent majority opinion of the United States Supreme Court in Alleyne v. United States, this Court is satisfied that the jury determination pursuant to RCW 10.95.60(4) must be characterized as an element of the offense for which the mandatory punishment is death. This court is also mindful, however, of our State Supreme Court's decision in State v. Yates, 161 Wn.2d 714, 168 P.2d 359 (2007).

In Yates, the Court held that neither the statutory aggravating factors under RCW 10.95.020 nor the absence of mitigating factors under RCW 10.95.060(4) were essential elements of the crime of aggravated first degree murder. Yates at 758-59. Although Yates was decided after Ring and Apprendi, our Supreme Court obviously did not have the benefit of the recent decision in Alleyne which set forth a framework for element analysis that was adopted by the majority of that Court. In light of the Alleyne decision, the continued vitality of Yates is questionable.

For example, in Yates the majority opinion states that "the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty." Yates at 758. This language in

Yates cannot be easily reconciled with the Supreme Court's recent clear pronouncement in Alleyne.

Furthermore, fewer than 8 months after rendering its decision in Yates, our Supreme Court decided State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). In Recuenco, the majority opinion stated the following:

> When the term 'sentence enhancement' describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an 'element' of a greater offense than the one covered by the jury's guilty verdict. Apprendi, 530 U.S. at 494 n. 19. Contrary to the dissent's assertions, Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements."
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> Recuenco at 434.

Having interpreted Apprendi as encompassing "sentencing enhancements" in Recuenco, it appears that the Court might have reached a different conclusion in Yates had that case been considered post-Recuenco.

Notably, our Supreme Court continued to struggle with the Ring and Apprendi line of cases in State v. Powell, 167 W.2d 672 (2009) and State v. Siers, 174 Wn.2d 269 (2012). In Powell, five of the justices went so far as to hold that aggravating factors that support an exceptional sentence above the standard range but within the prescribed range for the statutory offense are essential elements of the charged crime that must be pled in the information. Justice Owens, writing the lead opinion on the issue, stated that "[r]ecent United States Supreme Court precedent and this Court's own precedent have clarified the definition of an essential element of a crime to include any factor that exposes a defendant to punishment greater than that authorized by the jury verdict." Powell at 691-92. Because an exceptional sentence was higher than the standard

range otherwise applicable, the Court held that the aggravating factor supporting the exceptional sentence was an element that must be pled.

Three years later, a divided court reversed its earlier decision in Powell. Five justices held that aggravating circumstances that merely permit an exceptional sentence above the standard range but not beyond the statutory maximum are not essential elements that need to be pled in the information. In a strongly worded dissent, however, four justices maintained that *stare decisis* should govern and stated that they were "unconvinced that Powell was both incorrect and harmful." Siers at 287.

In short, our Supreme Court has been unsettled in its application of Ring and Apprendi. Although Siers signals a retreat from the court's decision in Powell, notably the court was split 5 – 4.

Most importantly, however, neither Siers nor Powell involved a potential sentence that would exceed the maximum penalty authorized for the statutory offense.

IV. Conclusion

Given the unsettled nature of the law in Washington State and the clear directive of the majority opinion in Alleyne, this court finds that the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment. The relief requested by McEnroe, however, is at best premature and is, therefore, denied without prejudice. Accordingly, the death penalty is not stricken at this juncture.

SIGNED this 2nd day of January, 2014.

The Honorable JEFFREY M. RAMSDELL